

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: APPLICATION FOR) CR-15-XR-90304 LHK
TELEPHONE INFORMATION NEEDED)
FOR A CRIMINAL INVESTIGATION,) SAN JOSE, CALIFORNIA
)
) JUNE 24, 2015
)
_____) PAGES 1-56
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JEFFREY B. SCHENK
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FOR THE DEFENDANT: FEDERAL PUBLIC DEFENDER'S OFFICE
BY: ELLEN V. LEONIDA
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OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

1 SAN JOSE, CALIFORNIA

JUNE 24, 2015

2 P R O C E E D I N G S

3 (COURT CONVENED AT 11:31 A.M.)

4 THE CLERK: CALLING CASE 15-XR-90304, UNITED STATES
5 OF AMERICA VERSUS IN RE: APPLICATION FOR TELEPHONE INFORMATION
6 NEEDED FOR A CRIMINAL INVESTIGATION.

7 IF THE PARTIES WOULD PLEASE STATE THEIR APPEARANCES.

8 MS. LEONIDA: GOOD MORNING, YOUR HONOR.

9 ELLEN LEONIDA FROM THE FEDERAL PUBLIC DEFENDER'S OFFICE.

10 MR. SCHENK: GOOD MORNING, YOUR HONOR. JEFF SCHENK
11 ON BEHALF OF THE UNITED STATES.

12 THE COURT: OKAY. GOOD MORNING AND WELCOME.

13 SO LET'S START OFF, I'D JUST LIKE TO UNDERSTAND WHEN THE
14 INFORMATION IS RECORDED. SO I UNDERSTAND THAT WHEN A TEXT IS
15 SENT OR RECEIVED OR A PHONE CALL IS DIALLED OR RECEIVED, AT
16 THAT POINT THERE'LL BE A RECORDING OF THE CELL TOWER LOCATION
17 OF THAT DEVICE, BOTH AT THE BEGINNING AND THE END OF THE TEXT
18 OR THE CALL.

19 BUT I ALSO UNDERSTAND THAT WHENEVER THE PHONE IS ON, IT'S
20 CONSTANTLY GOING TO BE PINGING THE CELL TOWERS TO ALWAYS TRY TO
21 IDENTIFY WHAT IS THE BEST CELL TOWER FOR ANY PHONE CALL OR TEXT
22 THAT'S GOING TO BE RECEIVED TO BE SENT TO.

23 SO IS THAT INFORMATION RECORDED AS WELL?

24 MR. SCHENK: YOUR HONOR, I DON'T BELIEVE THAT ALL OF
25 THE SERVICE PROVIDERS HAVE THE SAME ANSWER TO THAT QUESTION.

1 THE COURT: UM-HUM.

2 MR. SCHENK: I ALSO THINK THAT THE INFORMATION THAT
3 SERVICE PROVIDERS PROVIDE TO THE GOVERNMENT IS DIFFERENT. EACH
4 SERVICE PROVIDER DOES NOT NECESSARILY PROVIDE THE SAME
5 INFORMATION.

6 FOR INSTANCE, BEGINNING AND END OF CALLS, IF IT'S A
7 LENGTHY CALL, THE CELL TOWER IS USED AT THE BEGINNING AND THE
8 END; OR IF THE INDIVIDUAL IS DRIVING IN A CAR AND, THEREFORE,
9 HITS OFF OF MANY TOWERS DURING THE LENGTH OF AN HOUR LONG CALL,
10 IN SOME INSTANCES A PROVIDER WOULD PROVIDE ONLY THE FIRST AND
11 LAST TOWER USED, AND THEN SOME PROVIDE TOWERS USED ALONG THE
12 WAY.

13 SO I DON'T THINK THAT THE COURT HAS BEFORE IT AN ANSWER TO
14 THAT QUESTION THAT IS CONSISTENT AMONG THE CELL TOWERS, CELL
15 COMPANIES.

16 THE COURT: AND WHAT IS THE REASON FOR THE VARIANCE
17 IN TERMS OF IS IT JUST THAT CARRIERS KEEP DIFFERENT AMOUNTS OF
18 DATA? OR IS IT THE REQUEST OF THE GOVERNMENT REQUESTS MORE
19 PRECISE INFORMATION? WHAT DETERMINES -- OR IT'S JUST WHATEVER
20 THAT CARRIER TENDS TO RECORD AND OBTAIN?

21 MR. SCHENK: THIS INFORMATION IS NOT KEPT AT THE
22 REQUEST OF THE GOVERNMENT.

23 THE COURT: I UNDERSTAND.

24 MR. SCHENK: THIS IS INFORMATION THAT VARIOUS
25 CARRIERS KEEP AND, AS A RESULT, MAKE DIFFERENT BUSINESS

1 DECISIONS ABOUT THE NEED FOR THE INFORMATION.

2 THE COURT'S RIGHT. A CARRIER, IF IT MADE A VERY GENERAL
3 RETENTION POLICY, WOULD BE RETAINING A SIGNIFICANT AMOUNT OF
4 DATA. IF THEY MAKE A MORE LIMITED RETENTION POLICY, THEY HAVE
5 TO MAINTAIN LESS DATA.

6 THE GOVERNMENT DOES NOT CONTROL THE AMOUNT OF DATA THAT
7 THE CARRIER RETAINS.

8 THE COURT: DO WE HAVE ANY INFORMATION ON HOW LONG
9 CARRIERS RETAIN THE INFORMATION?

10 MR. SCHENK: I BELIEVE THAT THAT ALSO IS DIFFERENT
11 AMONG CARRIERS.

12 THE COURT: AND -- WELL, I'D LIKE -- SOME PORTION
13 WILL BE SORT OF OPEN, IN OPEN COURT, BUT THEN THERE ARE A
14 COUPLE OF QUESTIONS I'M JUST GOING TO ASK THE GOVERNMENT
15 BECAUSE IT'S ABOUT A SEALED APPLICATION, OKAY, AND I'LL HAVE TO
16 CLOSE THE COURTROOM FOR THAT PART, SO WE'LL JUST SAVE THAT FOR
17 THE END. OKAY?

18 MR. SCHENK: YES, YOUR HONOR.

19 THE COURT: BUT BOTH SIDES AGREE, THERE'S NO WAY
20 TO -- IF THE PHONE IS ON -- WELL, OKAY. SO THERE'S NO ANSWER
21 TO WHETHER THE INFORMATION IS RECORDED WHEN THE PHONE IS ON,
22 BUT NOT IN -- NOT IN USE IN TERMS OF RECEIVING OR SENDING A
23 TEXT OR A CALL?

24 MS. LEONIDA: I THINK, YOUR HONOR, IN ADDITION TO IT
25 VARYING BY CARRIER -- FOR EXAMPLE, I THINK THAT SPRINT KEEPS

1 THOSE RECORDS.

2 BUT THE OTHER PIECE OF INFORMATION --

3 THE COURT: YOU MEAN THEY KEEP THE RECORD -- WHEN THE
4 PHONE IS JUST CONSTANTLY PINGING THE CELL TOWER, I'M HERE,
5 YOU'RE SAYING THAT SPRINT KEEPS ALL OF THOSE PINGS?

6 MS. LEONIDA: YES, YOUR HONOR.

7 THE COURT: OKAY.

8 MS. LEONIDA: I ALSO WANTED TO ADD THAT ACCORDING TO
9 AGENT LUNA'S DECLARATION SUBMITTED WITH THE REPLY IN THIS CASE,
10 THAT IT'S NOT JUST INCOMING AND OUTGOING CALLS AND INCOMING AND
11 OUTGOING TEXT MESSAGES AND VOICEMAILS, BUT ALSO WHEN DATA IS
12 BEING ACCESSED BY A PHONE THAT IT CONNECTS TO A TOWER.

13 THE COURT: I UNDERSTOOD THAT. BUT THE FOCUS OF THE
14 GOVERNMENT'S MOTION SEEMS TO BE MORE -- WELL, MAYBE WE CAN GET
15 INTO THAT.

16 NOW, WHAT ABOUT WHEN A PHONE IS ROAMING AND GOES ONTO A
17 DIFFERENT CARRIER'S NETWORK? YOU DON'T REQUEST THAT
18 INFORMATION; RIGHT? YOU JUST WANT THE ACTUAL CARRIER FOR THE
19 TARGET DEVICE?

20 MR. SCHENK: THE RECORDS THAT THE CARRIER HAS THAT
21 ARE RESPONSIVE TO THE APPROVED 2703(D) ORDER WOULD BE PROVIDED
22 TO THE GOVERNMENT. SO THE LINE WOULD BE DRAWN AT WHETHER THOSE
23 ARE RECORDS THAT, FOR INSTANCE, VERIZON OR SPRINT, THE
24 RECIPIENT OF THE ORDER, HAS, MAINTAINS, AND THEN, THEREFORE,
25 PROVIDES TO US.

1 THE COURT: OKAY. SO THEN THAT MAY ALSO VARY -- OR
2 WE JUST DON'T KNOW WHETHER ONE CARRIER, PRESUMABLY IF THEY
3 CHARGE ANOTHER CARRIER OR HAVE TO COMPENSATE ANOTHER CARRIER
4 FOR HANDLING THE CALL OF THE FIRST CARRIER'S USER BECAUSE
5 THEY'RE OUT OF SERVICE.

6 MR. SCHENK: THERE'S JUST NO EVIDENCE BEFORE THE
7 COURT ON THAT OR ON THE SPRINT RETENTION POLICY OR ON ANY
8 PARTICULAR RETENTION POLICY. THERE'S NO EVIDENCE BEFORE THE
9 COURT.

10 THE COURT: OKAY. NOW, YOU ARE NOT APPEALING
11 JUDGE LLOYD'S ORDER ON PROSPECTIVE CELL SITE INFORMATION, AND
12 WHY IS THAT? DO YOU THINK THAT THAT IS LEGALLY DIFFERENT AND
13 DISTINCT THAN THE HISTORICAL CELL SITE INFORMATION?

14 MR. SCHENK: I THINK THAT THEY'RE SEPARATE ARGUMENTS
15 THAT THE GOVERNMENT WOULD MAKE IN AN APPEAL OF THAT, THAT IT IS
16 INFORMATION WE COULD OBTAIN PURSUANT TO 2703(D), BUT IT'S NOT
17 NECESSARY FOR THIS COURT TO ENTERTAIN THAT PORTION OF IT AT
18 THIS TIME.

19 THE COURT: OKAY.

20 MR. SCHENK: IT RAISES --

21 THE COURT: OKAY. WHAT DO YOU THINK IS
22 CONSTITUTIONALLY DIFFERENT ABOUT PROSPECTIVE VERSUS HISTORICAL
23 CELL SITE INFORMATION?

24 MR. SCHENK: HISTORIC IS RECORDS THAT ARE STORED BY
25 THE TELEPHONE COMPANY AT THE TIME THE JUDGE SIGNS THE 2703(D)

1 ORDER.

2 SO WHEN JUDGE LLOYD OR ANOTHER MAGISTRATE RECEIVES A
3 REQUEST FROM THE GOVERNMENT FOR RECORDS THAT ARE IN THE
4 POSSESSION OF A PHONE COMPANY, THOSE RECORDS ARE IN THE
5 POSSESSION OF THE PHONE COMPANY AT THE TIME THAT THE JUDGE IS
6 SIGNING THE ORDER AND, THEREFORE, ARE COMPLETELY WITHIN THE
7 GAMBIT OF 2703.

8 THE ARGUMENT THAT IS DIFFERENT FOR PROSPECTIVE IS AT WHAT
9 POINT DO THOSE RECORDS BEING STORED? AND THAT'S AN ANALYSIS
10 THAT THIS COURT DOES NOT NEED TO MAKE BECAUSE THE GOVERNMENT
11 ISN'T APPEALING THE PROSPECTIVE PORTION OF OUR ORIGINAL REQUEST
12 TO THE MAGISTRATE.

13 THE COURT: AND WHERE CAN I LOOK THAT IT MATTERS
14 WHETHER THE INFORMATION IS STORED OR NOT? I MEAN, ARE YOU
15 SAYING THAT SMITH AND MILLER ONLY APPLY IF THE THIRD PARTY IS
16 STORING THE INFORMATION AND IT'S LIMITED TO THAT INSTANCE, ONLY
17 IF THE INFORMATION IS STORED?

18 MR. SCHENK: NO. IT WASN'T NECESSARY FOR SMITH AND
19 MILLER'S HOLDINGS THAT THAT INFORMATION WAS NOT ONLY
20 TRANSMITTED, BUT ALSO STORED WITH THE THIRD PARTY. THE THIRD
21 PARTY DOCTRINE SUGGESTS THAT INFORMATION THAT'S PROVIDED TO A
22 THIRD PARTY, EVEN FOR LIMITED PURPOSES, IS --

23 THE COURT: RIGHT. SO THAT WOULD APPLY TO
24 PROSPECTIVE, SO WHY ARE YOU SAYING IT'S DIFFERENT THAT -- IF
25 YOU VOLUNTARILY CONVEY INFORMATION TO A THIRD PARTY AND THAT

1 ALL -- THAT AUTOMATICALLY MAKES THAT INFORMATION THEN SUBJECT
2 TO, AT LEAST TO THE GOVERNMENT, THAT SEEMS LIKE THAT THIRD
3 PARTY DOCTRINE WOULD APPLY REGARDLESS OF WHETHER INFORMATION IS
4 HISTORIC AND STORED BY A THIRD PARTY OR PROSPECTIVE; RIGHT?

5 MR. SCHENK: I AGREE WITH YOU. I THINK WE COULD GET
6 PROSPECTIVE UNDER THE STORED COMMUNICATIONS ACT BECAUSE WE
7 WOULDN'T GET IT UNTIL IT IS OBTAINED BY THE TELEPHONE COMPANY
8 AND STORED.

9 THE QUESTION FOR THIS COURT, THOUGH --

10 THE COURT: SO YOU'RE SAYING THAT LEGALLY THE
11 INFORMATION HAS TO BE STORED? OTHERWISE YOU CAN'T GET IT
12 THROUGH THIS SPECIFIC AND ARTICULABLE REASON?

13 MR. SCHENK: THAT'S WHAT THE STATUTE, THE STORED
14 COMMUNICATIONS ACT AND THE AMENDMENTS THAT CALEA MADE TO IT
15 SUGGEST THAT, YES, ONCE THAT INFORMATION IS TRANSMITTED AND
16 STORED BY THE TELEPHONE COMPANY, IF THE GOVERNMENT MEETS THE
17 SPECIFIC AND ARTICULABLE FACTS STANDARD, THAT INFORMATION IS --
18 SHALL BE PROVIDED TO THE GOVERNMENT.

19 THE COURT: I GUESS I -- I STILL AM NOT CLEAR. ARE
20 YOU SAYING THEN THAT IT HAS TO BE STORED IN ORDER FOR YOU TO
21 GET IT? BECAUSE THAT WOULD MEAN THAT YOU WOULD NOT BE ENTITLED
22 TO GET THE PROSPECTIVE INFORMATION BECAUSE IT HASN'T BEEN
23 STORED YET.

24 MR. SCHENK: IT'S -- WELL, AGAIN, THE "YET" IS JUST A
25 FACTION OF THE -- IT'S A FACTOR OF THE DATE OF THE SIGNING OF

1 THE ORDER. IT CERTAINLY IS STORED, EVEN PROSPECTIVE, BEFORE
2 IT'S GIVEN TO THE GOVERNMENT. IT'S STORED, AND I'M NOT SURE OF
3 THE TIME LAPSE, MOMENTARILY OR RELATIVELY QUICKLY, THEN
4 PROVIDED TO THE GOVERNMENT.

5 BUT IN BOTH INSTANCES, HISTORIC AND PROSPECTIVE, IT'S
6 STORED INFORMATION OF THE PHONE COMPANY BEFORE IT'S PROVIDED TO
7 THE GOVERNMENT.

8 THE COURT: LET ME LET YOU RESPOND TO THAT.

9 MS. LEONIDA: THANK YOU, YOUR HONOR.

10 THE REAL QUESTION, BEFORE BUSINESS RECORDS OR WHETHER IT'S
11 STORED, IS WHETHER CITIZENS HAVE A LEGITIMATE EXPECTATION OF
12 PRIVACY IN THIS INFORMATION. JUST BECAUSE IT'S CALLED THE
13 STORED COMMUNICATION ACT DOESN'T MEAN THAT ANYTHING THAT'S
14 STORED IS SUBJECT TO IT.

15 THE FOURTH AMENDMENT REQUIRES THIS COURT TO DETERMINE
16 WHETHER IT'S SOMETHING THAT PEOPLE HAVE A SUBJECTIVE AND
17 REASONABLE EXPECTATION FOR PRIVACY ON.

18 THE COURT: LET ME INTERRUPT YOU HERE. HOW DO YOU
19 RESPOND TO THE PRIVACY POLICY OF AT&T AND T-MOBILE? BECAUSE
20 THEY DO NOTIFY THEIR USERS THAT THEY ARE COLLECTING LOCATION
21 INFORMATION, SO HOW DO YOU HAVE A REASONABLE EXPECTATION OF
22 PRIVACY WHEN YOU'RE ON NOTICE THAT THAT INFORMATION IS BEING
23 COLLECTED?

24 MS. LEONIDA: I HAVE A COUPLE OF RESPONSES.

25 THE COURT: OKAY.

1 MS. LEONIDA: ONE, THE MOST BASIC RESPONSE IS THAT
2 THE QUON CASE ADDRESSING E-MAILS THAT WERE SENT TO POLICE
3 OFFICERS ON THEIR DEPARTMENT ISSUED TELEPHONES, THAT THEY HAD A
4 POLICY THAT WAS EVEN MORE EXPLICIT, THAT NOTIFIED THE POLICE
5 OFFICER THAT ANY COMMUNICATIONS THEY RECEIVED WEREN'T PRIVATE,
6 THAT THEY WEREN'T CONFIDENTIAL, THAT THEY -- IT EXPRESSLY SAID,
7 "YOU HAVE NO EXPECTATION OF PRIVACY IN THESE E-MAILS," AND THE
8 COURT HELD, NONETHELESS, BECAUSE OF THE NATURE OF THE E-MAILS,
9 THAT THERE WAS AN EXPECTATION OF PRIVACY.

10 THE COURT: BUT IN THAT CASE WEREN'T THEY LOOKING AT
11 THE CONTENT?

12 MS. LEONIDA: YES.

13 THE COURT: OKAY. SO WOULDN'T THAT BE A
14 DISTINGUISHING FACTOR HERE? WE'RE NOT ASKING FOR THE CONTENT
15 OF THE TEXT OR THE PHONE CALL. WE'RE ASKING JUST FOR THE
16 EXISTENCE OF THAT THIS CALL HAPPENED AT THIS TIME FROM THIS
17 LOCATION. DOES THAT MATTER OR NOT?

18 MS. LEONIDA: I THINK THAT THE HISTORICAL CELL SITE
19 INFORMATION IS MUCH MORE ANALOGOUS TO CONTENT. I THINK IN
20 TERMS OF WHETHER -- IN TERMS OF THE IMPACT THAT THE NOTICE HAS,
21 THE FACT THAT IT -- THAT THE NOTICE DOESN'T MATTER FOR CONTENT,
22 I THINK THAT THAT DOES TRANSLATE TO THIS CONTEXT.

23 IF -- CONTENT, WHICH I THINK EVERYONE AGREES THERE'S AN
24 EXPECTATION OF PRIVACY IN, IF THAT EXPECTATION CAN'T BE
25 STRIPPED BY EXPRESSLY SAYING, "THIS ISN'T YOUR PHONE, YOU HAVE

1 NO EXPECTATION OF PRIVACY IN IT," I THINK THE SAME WOULD APPLY
2 TO HISTORICAL CELL SITE INFORMATION.

3 I THINK THAT THE USE OF CELL PHONES IS SO UBIQUITOUS THAT
4 I THINK THE MORE SALIENT FACTOR IS WHAT A REASONABLE PERSON
5 THINKS.

6 WE KNOW FROM RESEARCH SUBMITTED TO THE COURT, 82 PERCENT
7 OF AMERICANS THINK THAT THEIR CELL SITE LOCATION INFORMATION IS
8 MORE PRIVATE THAN THE CONTEXT OF THEIR TEXT MESSAGES, IT'S MORE
9 PRIVATE THAN THEIR RELIGIOUS AND POLITICAL AFFILIATIONS, MORE
10 PRIVATE THAN A LOT OF THINGS THAT THE GOVERNMENT SAYS WOULD BE
11 ENTITLED TO PRIVACY PROTECTION.

12 AND IF THE COURT CONSIDERS THE RECENT SUPREME COURT
13 OPINIONS, JONES AND RILEY, ADDRESSING THE DIFFERENCES BETWEEN
14 DIGITAL AND PHYSICAL EVIDENCE, I THINK THAT THAT EXPECTATION IS
15 A REASONABLE ONE.

16 IN JONES, FOR EXAMPLE, THE GPS TRACKER THAT WAS PLACED ON
17 THE CAR, ACCORDING TO THE FIVE CONCURRENCES, REVEALED A
18 DETAILED AND COMPREHENSIVE PICTURE OF WHERE THE DRIVER OF THAT
19 CAR WENT.

20 AND ONE THING THAT'S CRITICAL HERE IS THAT CELL PHONES,
21 AGAIN, AS THE RESEARCH BEARS OUT, ARE WITH PEOPLE ALL THE TIME.

22 THE GOVERNMENT IS SEEKING INFORMATION FOR A TWO MONTH
23 PERIOD FOR A DEVICE THAT PEOPLE KEEP WITH THEM 24 HOURS A DAY,
24 7 DAYS A WEEK.

25 UNLIKE A CAR, WHICH GETS PARKED AND THEY CAN GO ANYWHERE

1 WITHIN TWO BLOCKS, THEY CAN TAKE PUBLIC TRANSPORTATION, A CELL
2 PHONE IS SOMETHING THAT A PERSON HAS ON THEIR PERSON MOST OF
3 THE TIME AT HOME, AT CHURCH, AT WORK, AT THE DOCTOR'S OFFICE,
4 IN FEDERAL COURT.

5 AND I THINK THAT THAT MAKES IT MUCH MORE ANALOGOUS TO
6 CONTENT THAN TO SUBSCRIBER INFORMATION BECAUSE THE WEALTH OF
7 INFORMATION THAT THAT REVEALS ABOUT A PERSON IS MUCH MORE
8 ANALOGOUS TO THE CONTEXT OF THEIR TEXT MESSAGES AND THAT'S WHY
9 THE 82 PERCENT OF PEOPLE RESEARCHED BY PEW SAID THAT THEY WOULD
10 RATHER HAVE YOU READ THEIR TEXT MESSAGES THAN SEE WHERE THEY'RE
11 GOING ALL THE TIME.

12 THE COURT: BUT THERE'S NO OTHER CASE THAT'S FOUND
13 THAT IT'S EQUIVALENT TO CONTENT, RIGHT? I'D BE THE FIRST ONE
14 TO DO THAT?

15 MS. LEONIDA: THERE IS NOT, YOUR HONOR.

16 THE COURT: OKAY. SO LET ME TRY TO CLARIFY MY
17 UNDERSTANDING OF YOUR POSITION. SO YOUR POSITION IS THE THIRD
18 PARTY DOCTRINE IS STILL GOOD LAW, BUT THAT JONES AND RILEY HAVE
19 CREATED EXCEPTIONS BASED ON CHANGING TECHNOLOGY? OR HOW DO YOU
20 SQUARE YOUR POSITION?

21 MS. LEONIDA: WELL, MY POSITION IS TWO-FOLD.

22 THE COURT: YEAH.

23 MS. LEONIDA: I THINK ON ONE LEVEL, EVEN THE SMITH
24 CASE IN FOOTNOTE 5 RECOGNIZED THAT WE COULD GET TO A POINT, AS
25 A SOCIETY, WHERE EVEN A SUBJECTIVE -- EVEN THE LACK OF A

1 SUBJECTIVE EXPECTATION OF PRIVACY REQUIRES COURTS TO DO A
2 NORMATIVE INQUIRY, TO MAKE SURE THAT THE EXPECTATION OF PRIVACY
3 THAT WE'RE SAYING IS REASONABLE FOR FOURTH AMENDMENT PURPOSES
4 IS ACTUALLY A REASONABLE ONE.

5 THEY GAVE THE EXAMPLE OF IF THERE WAS A TELEVISION
6 ANNOUNCEMENT THAT SAID THAT THE POLICE COULD COME INTO YOUR
7 HOUSE AND SEARCH IT, THAT DOESN'T MEAN THAT THEY CAN JUST
8 BECAUSE EVERYBODY IS TOLD THAT THEY CAN.

9 AND I THINK THAT THAT'S ALSO A FACTOR WITH THE COURT'S
10 CONCERN IN THE PRIVACY POLICIES. IF THE CELL PHONE CARRIERS
11 SENT OUT NOTICES TO ALL OF THEIR SUBSCRIBERS THAT THEIR CONTENT
12 WAS NO LONGER PRIVATE, THAT DOESN'T MEAN THAT THE GOVERNMENT
13 DOESN'T NEED A WARRANT TO GET IT.

14 AND I THINK THAT THE KIND OF NORMATIVE ANALYSIS THAT THAT
15 FOOTNOTE REFERRED TO IS SOMETHING THAT WE HAVE TO DO, BUT
16 WITHOUT EVEN UNDERTAKING THAT, I THINK THAT UNDER SMITH AND
17 MILLER, THIS IS VERY DIFFERENT KIND OF INFORMATION.

18 IN SMITH AND MILLER, THE INFORMATION AT ISSUE WAS
19 INFORMATION THAT THE CONSUMER VOLUNTARILY CONVEYED TO THE BANK
20 AND TO THE PHONE COMPANY. THE CONSUMER DIALLED THE PHONE
21 NUMBER, THEY DID IT -- THEY GAVE IT TO THE PHONE COMPANY FOR
22 THE EXPRESS PURPOSE OF ACHIEVING THEIR AIM, WHICH WAS CALLING A
23 PERSON.

24 IN MILLER, THE CONSUMER WRITES A CHECK FOR THE PURPOSE OF
25 HAVING THE BANK CASH THAT CHECK.

1 WHEN THE PHONE COMPANY SENDS A BILL, IT HAS A LIST OF THE
2 NUMBERS THAT YOU'VE ASKED THE PHONE COMPANY TO DIAL FOR YOU SO
3 YOU CAN TALK TO PEOPLE.

4 SIMILARLY WITH MILLER. WHEN THE BANK STATEMENT COMES,
5 IT'S A LIST OF CHECKS THAT YOU'VE ASKED THE BANK TO CASH FOR
6 YOU, AS OPPOSED TO THIS INFORMATION, WHICH IS NOT ONLY
7 PASSIVELY CONVEYED TO A THIRD PARTY, WHICH THE FORRESTER CASE,
8 THE NINTH CIRCUIT CASE SAID WOULD BE DIFFERENT, IT'S NOT ONLY
9 PASSIVELY CONVEYED, BUT THE PURPOSE OF IT IS DIFFERENT.

10 PEOPLE CARRY CELL PHONES IN ORDER TO MAKE CALLS. THEY
11 DON'T ANTICIPATE THAT THEY'RE GOING TO BE USED AS TRACKING
12 DEVICES.

13 AND THAT ALSO EXEMPTS THIS FROM THE THIRD PARTY DOCTRINE
14 OF SMITH AND MILLER.

15 THE COURT: SO LET ME ASK YOU, HOW CAN I RELY ON
16 JONES WHEN THAT WAS DECIDED ON TRESPASS LAW AND NOT BASED ON A
17 KATZ REASONABLE EXPECTATION OF PRIVACY ANALYSIS? HOW CAN I SAY
18 THAT UNDERMINES SMITH AND MILLER?

19 MS. LEONIDA: BECAUSE IF THE -- IF YOUR HONOR LOOKS
20 AT THE CONCURRENCES TOGETHER, THE MAJORITY OF THE SUPREME COURT
21 JUSTICES DID ENGAGE IN A KATZ ANALYSIS. AND FIVE SUPREME COURT
22 JUSTICES, WHEN THEY ENGAGED IN THAT ANALYSIS, FOUND THAT THE
23 EXPECTATION OF PRIVACY ESTABLISHED BY KATZ WAS VIOLATED BY
24 LONG-TERM LOCATION MONITORING BY THE GOVERNMENT.

25 JUDGE SOTOMAYOR WROTE SEPARATELY BECAUSE SHE AGREED WITH

1 BOTH. SHE WANTED TO BE CLEAR THAT SHE ALSO THOUGHT THAT THERE
2 WAS A PHYSICAL TRESPASS AT ISSUE.

3 BUT THE MAJORITY OF THE SUPREME COURT DID WRITE OPINIONS
4 SAYING THAT LONG-TERM ELECTRONIC SURVEILLANCE VIOLATES THE
5 FOURTH AMENDMENT.

6 THE COURT: AND LET ME SEE IF I JUST UNDERSTAND YOUR
7 POSITION CORRECTLY. SO YOU'RE SAYING THE USERS ARE VOLUNTARILY
8 CONVEYING THEIR INFORMATION TO THE CARRIER, BUT THAT THE
9 CARRIER -- I MEAN, ARE YOU BASICALLY ASKING FOR A SORT OF
10 FRONTAL ATTACK ON THE THIRD PARTY DOCTRINE SAYING EVEN THOUGH
11 THERE MAY HAVE BEEN A CONSENSUAL, VOLUNTARY CONVEYANCE TO THE
12 PHONE SERVICE OPERATOR, THAT THAT THEN SHOULD NOT BE TURNED
13 OVER TO THE GOVERNMENT? I MEAN --

14 MS. LEONIDA: NO, YOUR HONOR.

15 THE COURT: IT'S SOMEWHAT UNCLEAR.

16 MS. LEONIDA: NO, YOUR HONOR. I'M SORRY.

17 THE COURT: OKAY.

18 MS. LEONIDA: I'M SAYING THAT THE INFORMATION, THE
19 CELL SITE LOCATION INFORMATION IS NOT VOLUNTARILY CONVEYED TO
20 THE CARRIER.

21 THE COURT: EVEN WHEN SOME OF THE POLICIES ARE VERY
22 EXPLICIT ABOUT THAT INFORMATION BEING COLLECTED AND RETAINED?
23 IT DOESN'T SAY HOW LONG, BUT IT DOES SAY THAT -- I MEAN,
24 OBVIOUSLY SOME OF IT IS LIKE THE PHONE NUMBERS IN SMITH BECAUSE
25 YOU'RE BEING CHARGED, YOU KNOW, FOR THE TEXT, YOU'RE BEING

1 CHARGED FOR THE CALL, SO SOME OF IT THE USER KNOWS IS BEING
2 RECORDED AND RETAINED, AT LEAST FOR THE PURPOSES OF BILLING,
3 JUST LIKE IN SMITH.

4 MS. LEONIDA: AND I THINK THAT THE PHONE NUMBERS THAT
5 ARE DIALED ARE JUST LIKE IN SMITH, AND THAT'S INFORMATION THAT
6 IS QUALITATIVELY DIFFERENT THAN CELL SITE LOCATION INFORMATION.

7 WHEN PEOPLE MAKE A CALL, THEY'RE NOT NOTIFIED WHAT TOWER
8 THEIR PHONE IS HITTING TO MAKE THE CALL, MUCH LESS WHAT TOWER
9 THE CALL ENDS AT.

10 THE COURT: UM-HUM.

11 MS. LEONIDA: WHEN PEOPLE HAVE A PHONE IN THEIR
12 POCKET THAT RECEIVES A TEXT MESSAGE THAT THEY DON'T HEAR OR
13 VOICEMAIL THAT THEY IGNORE, THEY'RE NOT NOTIFIED BY THE PHONE
14 COMPANY THAT THAT INFORMATION IS BEING RECORDED, MUCH LESS THAT
15 IT CAN LATER BE GIVEN TO LAW ENFORCEMENT.

16 THE TECHNOLOGY THAT EXISTED WHEN SMITH AND MILLER WERE
17 DECIDED IN 1976 AND 1979 I THINK IS COMPLETELY INADEQUATE TO
18 ADDRESS THE TECHNOLOGY THAT'S BEFORE THIS COURT.

19 IN THAT CASE, THERE WAS A NUMBER -- THE COURT MADE AN
20 ANALOGY TO WHEN YOU WOULD CALL AN OPERATOR AND ASK THEM TO
21 CONNECT YOU ORALLY TO A NUMBER THAT YOU READ THEM OUT LOUD.

22 IT IS -- IT'S COMPLETELY DIFFERENT THAN THIS WHERE THE
23 CONSUMER -- I MEAN, MAYBE SOME COMPANIES HAVE A NOTICE THAT
24 THEY PUT ONLINE THAT I IMAGINE VERY FEW PEOPLE ACTUALLY READ
25 THAT HAS, IN THE MIDDLE OF HUNDREDS OF PAGES OF NOTICES, THE

1 FACT THAT THIS INFORMATION IS STORED.

2 BUT IF THE COURT LOOKS AT THE RESEARCH, I THINK THAT IT
3 IS -- I DON'T THINK IT'S AN HONEST ASSESSMENT OF WHAT PEOPLE
4 REALLY EXPECT IN TERMS OF PRIVACY TO SAY THAT THEY THINK THAT
5 EVERY TIME THEY MAKE A CALL, THE PHONE COMPANY IS NOTING WHERE
6 THEY ARE; THAT EVERY TIME THEY RECEIVE A TEXT, THE PHONE
7 COMPANY IS NOTING WHERE THEY ARE; THAT WHENEVER THEY CHECK THE
8 WEATHER ON THE WAY TO A PLACE, THAT SOMEBODY DOCUMENTS THAT AND
9 AGGREGATES ALL OF THAT INFORMATION AND CAN JUST TURN IT OVER TO
10 ANYONE.

11 THE COURT: SO LET ME ASK MR. SCHENK, DO YOU THINK
12 IT'S A REASONABLE BURDEN ON CITIZENS TO SAY, "JUST DON'T USE
13 ANY DEVICE, DON'T USE ANY CARRIER, THEY'RE ALL GOING TO COLLECT
14 THE INFORMATION AND RETAIN IT AND TURN IT OVER TO THE
15 GOVERNMENT, SO YOU CAN ALWAYS JUST OPT OUT"? I MEAN, THAT
16 SEEMS LIKE THE ONLY SOLUTION HERE.

17 MR. SCHENK: A FEW THOUGHTS. FIRST, THAT'S WHAT THE
18 DAVIS COURT SUGGESTED WAS CARRYING A CELL PHONE --

19 THE COURT: DO YOU THINK THAT'S A REASONABLE BURDEN
20 IN THIS COUNTRY, THAT WE SHOULD TELL PEOPLE TO NOT USE A CELL
21 PHONE --

22 MR. SCHENK: IT WASN'T REQUIRED --

23 THE COURT: -- IF YOU WANT YOUR PRIVACY RIGHTS?

24 MR. SCHENK: PEOPLE MAKE THAT SAME DECISION WHEN THEY
25 USE CREDIT CARDS OR THEY USE BANK ACCOUNTS.

1 I MEAN, THE IDEA THAT -- YOU CAN'T REALLY LIVE IN SOCIETY
2 TODAY WITHOUT PARTICIPATING IN THE BANKING SYSTEM. THAT IS
3 INFORMATION THAT THE GOVERNMENT OBTAINED WITH A LOWER BURDEN.

4 RECALL THAT WHEN THE CALEA AMENDMENT CHANGED 2703, WHAT
5 THEY DID WAS CREATE THIS INTERMEDIATE LEVEL OF SCRUTINY TO
6 OBTAIN THIS TYPE OF INFORMATION, SPECIFIC AND ARTICULABLE
7 FACTS, AND THE LEGISLATIVE HISTORY CONCERNING THAT AMENDMENT
8 SUGGESTED THAT PEOPLE WERE AWARE THAT LOCATION INFORMATION WAS
9 INCLUDED WITH IT AND THAT THE ADDITIONAL PROTECTION, THAT IS,
10 THIS NEUTRAL MAGISTRATE, THE ARBITER BETWEEN THE GOVERNMENT AND
11 THE PHONE COMPANY, WAS GOING TO PLAY A ROLE OF PROTECTING THE
12 LIMITED PRIVACY INTERESTS IN THIS INFORMATION THAT WAS
13 RECOGNIZED AT THE TIME.

14 BUT TO SAY THAT --

15 THE COURT: LET ME ASK YOU A QUESTION, THOUGH. YOU
16 WANT TO HAVE INFORMATION ABOUT WHERE SOMEONE'S BEEN FOR 60
17 DAYS. DO YOU THINK THAT OVER A 60-DAY WINDOW, A PERSON
18 CARRYING A CELL PHONE ON THEIR BODY IS GOING TO ENTER A PRIVATE
19 BUILDING, ENTER A HOME, OR NOT?

20 MR. SCHENK: I THINK THEY WILL --

21 THE COURT: OR DO YOU THINK THEY'RE ALWAYS GOING TO
22 BE OUT AND ABOUT IN PUBLIC SPACES?

23 MR. SCHENK: I THINK THEY'LL BE IN PUBLIC AND PRIVATE
24 SPACES.

25 THE CASE LAW REGARDING THE THIRD PARTY DOCTRINE DOES NOT

1 MAKE A DISTINCTION THERE.

2 PEOPLE USE CREDIT CARDS IN VARIOUS PLACES AND WE OBTAIN
3 INFORMATION FROM CREDIT CARDS THAT SHOWS LOCATION.

4 THE COURT: OKAY. BUT IN THE THIRD PARTY DOCTRINE,
5 THEY WERE TALKING ABOUT GETTING LANDLINE NUMBERS DIALLED FOR A
6 THREE-DAY WINDOW. I DON'T THINK THEY WERE SAYING FOLLOW A
7 HUMAN BODY FOR 60 DAYS EVERYWHERE THAT PERSON GOES. RIGHT?

8 MR. SCHENK: IN SMITH, IN THE WORLD OF LANDLINES --
9 AT THAT POINT WE ACTUALLY KNEW THEY WERE IN THEIR HOME.

10 THE COURT: UM-HUM.

11 MR. SCHENK: SO TO NOW DISCUSS THAT, YOU KNOW,
12 TECHNOLOGY IS EVOLVING TO A PLACE WHERE WE FEAR PEOPLE ARE
13 GOING TO CARRY CELL PHONES WITH THEM EVERYWHERE, INCLUDING INTO
14 THEIR HOME, AND CELL SITE INFORMATION WILL THEN REVEAL THAT A
15 PERSON WAS IN THEIR HOME IS ACTUALLY A LONG WAY BACK TO THE
16 WORLD WE WERE IN WHEN THE ONLY LOCATION INFORMATION FOR HOMES
17 WAS IN THE HOME.

18 THERE WAS NO FEAR IN SMITH THAT WE WERE REVEALING THE
19 PERSON'S LOCATION IN THEIR PRIVATE SPACE BECAUSE THEY WERE
20 MAKING A CALL FROM THEIR HOME.

21 THAT'S NOT THE LINE THAT THE CASES DRAW IN SUGGESTING THAT
22 A WARRANT IS REQUIRED.

23 WHAT THE COURT SAID A MOMENT AGO WAS TRUE. IF THIS COURT
24 FOUND THAT A WARRANT WAS REQUIRED FOR THIS TYPE OF INFORMATION,
25 NON-CONTENT INFORMATION, IT WOULD BE THE FIRST COURT TO FIND

1 THAT WAY.

2 THREE CIRCUIT COURTS THAT HAVE RULED ON IT HAVE ALL GONE
3 THE OTHER WAY ON IT AND, IN FACT, THE THIRD CIRCUIT QUESTIONED
4 THE VOLUNTARINESS OF THE TRANSFER OF THE INFORMATION.

5 JUDGE TASHIMA, SITTING BY DESIGNATION IN THE THIRD
6 CIRCUIT, WROTE A CONCURRENCE TO SAY, "I THINK IT'S UNREASONABLE
7 TO THINK THAT THIS INFORMATION ISN'T VOLUNTARILY SHARED. BUT
8 THAT'S NOT NECESSARY FOR WHAT WE DECIDED BECAUSE THE OPINION IN
9 THE CASE VIEWED THIS INFORMATION AS NON-CONTENT, ACCEPTABLE
10 UNDER THE SPECIFIC AND ARTICULABLE FACTS STANDARD, REGARDLESS
11 OF THE VOLUNTARINESS OF THE TRANSFER BY THE PHONE USER TO THE
12 PHONE COMPANY."

13 THE COURT: SO ONE OF THE AMICI -- AND I'M SORRY, I
14 CAN'T -- I THINK IT WAS EFF -- MENTIONED -- IT WAS ON PAGE 12
15 OF THEIR BRIEF -- MENTIONED THAT, YOU KNOW, IN CALIFORNIA,
16 THERE IS A RECOGNIZED REASONABLE EXPECTATION OF PRIVACY IN YOUR
17 CELL SITE INFORMATION, SO STATE LAW ENFORCEMENT CAN'T GET THAT
18 INFORMATION THROUGH A PEN REGISTER. THEY HAVE TO GO AND GET A
19 PROBABLE CAUSE SEARCH WARRANT.

20 WHAT ABOUT THEIR ARGUMENT THAT, YOU KNOW, AT LEAST PEOPLE
21 IN CALIFORNIA HAVE A DIFFERENT REASONABLE EXPECTATION OF
22 PRIVACY THAN PERHAPS PEOPLE IN ANOTHER STATE?

23 MR. SCHENK: NOTHING BINDING ON THE COURT.

24 AND OTHER CIRCUITS THAT HAVE VIEWED IT LOOK AT THE
25 REASONABLE EXPECTATION ANALYSIS, THE KATZ ANALYSIS, AS A

1 TWO-PART TEST, WHETHER --

2 THE COURT: WELL, WHAT DOES IT MATTER WHAT THE
3 ELEVENTH CIRCUIT AND THE FIFTH CIRCUIT DECIDE? I'M IN
4 CALIFORNIA. RIGHT?

5 MR. SCHENK: WELL, JUDGE ILLSTON DISCUSSED HOW SHE
6 FOUND THE FIRST PANEL OPINION IN DAVIS TO BE PERSUASIVE.

7 OF COURSE IT'S NOT BINDING ON THIS COURT, BUT THE COURT
8 CAN LEARN FROM THE OPINIONS OF OTHER CIRCUITS THAT HAVE DEALT
9 WITH THIS PRECISE ISSUE.

10 THE COURT: OKAY. BUT ANSWER THE QUESTION. IF
11 CALIFORNIA HAS RECOGNIZED A REASONABLE EXPECTATION OF PRIVACY
12 IN CELL SITE INFORMATION SUCH THAT THE STATE REQUIRES LAW
13 ENFORCEMENT TO GET A SEARCH WARRANT IN THIS STATE, DOES THAT IN
14 ANY WAY AFFECT WHAT A CALIFORNIA RESIDENT'S REASONABLE
15 EXPECTATION OF PRIVACY IS?

16 MR. SCHENK: NO, IT DOES NOT AFFECT WHETHER THAT
17 INDIVIDUAL NOW HAS A REASONABLE EXPECTATION OF PRIVACY IN THE
18 TRANSFER OF INFORMATION FROM THEIR CELL PHONE TO A CELL PHONE
19 COMPANY AND THE GOVERNMENT'S ABILITY UNDER 2703(D) TO OBTAIN
20 THAT UNDER THE SPECIFIC AND ARTICULABLE FACTS STANDARD.

21 THE COURT: DO YOU HAVE A VIEW ON THAT?

22 MS. LEONIDA: YES.

23 THE COURT: I THINK HE'S RIGHT. WHAT'S THE ANSWER?
24 WHY DOES IT MATTER? WE'RE IN SEPARATE AND PARALLEL SYSTEMS.
25 WHY DOES IT MATTER WHAT CALIFORNIA STATE REQUIRES?

1 MS. LEONIDA: IT MATTERS, YOUR HONOR, BECAUSE IT GOES
2 TO THE REASONABLENESS OF THE SUBJECTIVE EXPECTATIONS OF PRIVACY
3 OF THE RESIDENTS OF CALIFORNIA. EVERY CALIFORNIAN WHO LIVES IN
4 THE NORTHERN DISTRICT HAS BEEN TOLD BY THEIR STATE COURT OR
5 LEGISLATURE THAT THEY HAVE THIS REASONABLE EXPECTATION OF
6 PRIVACY, WHICH ADDS TO THE REASONABLENESS OF IT.

7 THEY HAVE A SUBJECTIVE EXPECTATION THAT THIS INFORMATION
8 IS PRIVATE, BEING TOLD BY THEIR STATE GOVERNMENT IN THE STATE
9 WHERE THEY LIVE, THAT IT IS, IT HAS TO INFORM NOT ONLY THE
10 SUBJECTIVE, BUT, AGAIN, WHETHER THAT'S A REASONABLE THING FOR
11 THEM TO THINK.

12 THE COURT: LET ME -- HOW MUCH OF A GREATER BURDEN
13 WOULD IT BE TO REQUIRE A PROBABLE CAUSE SEARCH WARRANT,
14 ESPECIALLY FOR HISTORIC -- IF IT'S HISTORICAL INFORMATION, THEN
15 THAT MEANS THE GOVERNMENT ALREADY HAS SOME SENSE ABOUT THE
16 DATES, ALREADY HAS SOME SENSE ABOUT THE DEVICE, ALREADY HAS
17 SOME SENSE ABOUT THE OWNER OF THE DEVICE, ALREADY HAS SOME
18 SENSE OF WHAT THEY'RE LOOKING FOR, SO IT JUST SEEMS LIKE MAYBE
19 FOR PROSPECTIVE INFORMATION, THERE MIGHT BE MORE ONGOING
20 INVESTIGATION CONCERNS.

21 BUT WHY WOULD YOU NOT HAVE PROBABLE CAUSE TO GET
22 HISTORICAL, PAST INFORMATION?

23 MR. SCHENK: A FEW ANSWERS TO THAT, YOUR HONOR.

24 THE COURT: UM-HUM.

25 MR. SCHENK: FIRST, IT IS A HEIGHTENED BURDEN. IN

1 FACT, THAT'S WHAT WE'RE LITIGATING ABOUT.

2 THERE'S NO DOUBT THERE ARE GOING TO BE CASES, IN MY
3 EXPERIENCE THERE ARE, AND I'M SURE IF YOU ASKED OTHER
4 PROSECUTORS THERE ARE, WHERE WE HAVE SUFFICIENT INFORMATION --
5 IT'S AN EARLY STAGE OF THE INVESTIGATION INVESTIGATIVE TOOL,
6 THAT IS, TO OBTAIN CELL SITE LOCATION INFORMATION.

7 IF EVERY INVESTIGATIVE TOOL NOW SHIFTS TO THE PROBABLE
8 CAUSE STANDARD, WHAT DO WE DO TO DEVELOP PROBABLE CAUSE FOR
9 SEARCH WARRANTS? IN SOME INSTANCES, CELL SITE LOCATION
10 INFORMATION IS INFORMATION THAT'S USED IN THE PROBABLE CAUSE
11 STATEMENT OF A SEARCH WARRANT.

12 BUT EVEN MORE, IT IGNORES THE STATUTORY SCHEME SET UP IN
13 2703, AND THAT IS TO SAY IT'S EASY TO GET PROBABLE CAUSE
14 SATISFIED, JUST DO THAT. I MEAN, CONGRESS DID SPECIFICALLY SAY
15 THAT'S A LOWER STANDARD.

16 NOW, RAISING THE STANDARD AT THE TIME, AT THE TIME YOU
17 COULD OBTAIN IT WITH SUBPOENAS, NOW THEY'RE SAYING PUT THE
18 MAGISTRATE IN BETWEEN THE PHONE COMPANY AND THE PERSON, MEET
19 THIS NEW STANDARD.

20 BUT TO SAY IT'S NOT THAT ONEROUS TO MEET THE PROBABLE
21 CAUSE STANDARD AND, THEREFORE, THE GOVERNMENT SHOULD JUST GET A
22 WARRANT BEGS THE QUESTION, IS A WARRANT REQUIRED? AND THE CASE
23 LAW, AND THE STATUTE ITSELF, ALL SAY THAT IT'S NOT.

24 THE COURT IS RIGHT, THERE ARE GOING TO BE SOME
25 INSTANCES --

1 THE COURT: WOULD YOU -- I'M SORRY TO INTERRUPT YOU.
2 WOULD YOU THINK THAT THE BURDEN MIGHT BE SLIGHTLY MORE ONEROUS
3 FOR PROSPECTIVE CELL SITE INFORMATION THAN HISTORICAL? IT
4 SEEMS LIKE WITH HISTORICAL, YOU'RE SORT OF AWARE OF AN
5 INCIDENT, YOU'RE AWARE OF THE DATE OF THAT INCIDENT AND YOU'RE
6 TRYING TO TRACK DOWN THAT INFORMATION, SO YOU ALREADY HAVE MORE
7 INFORMATION GOING FORWARD WHERE YOU MAY NOT KNOW WHO THIS
8 PERSON IS TALKING TO, WHAT THEY'RE ABOUT TO DO.

9 IS THERE A DIFFERENCE?

10 MR. SCHENK: NO. FOR ONGOING CONSPIRACIES OF
11 MULTIPLE DEFENDANTS, IT MAY BE THAT FOR ONE DEFENDANT, YOU
12 COULD MEET THE PROBABLE CAUSE STANDARD FOR HISTORIC AND FOR
13 PROSPECTIVE. THEY MAY BE CONSPIRING WITH OTHER INDIVIDUALS
14 THAT YOU YET CANNOT MEET A PROBABLE CAUSE STANDARD, BUT YOU
15 COULD MEET THE SPECIFIC AND ARTICULABLE FACTS STANDARD
16 REGARDLESS OF WHETHER WHAT YOU'RE SEEKING IS HISTORIC OR
17 PROSPECTIVE, KEEPING IN MIND AGAIN THAT WHAT WE'RE APPEALING
18 TODAY IS MERELY HISTORIC.

19 BUT THERE ARE GOING TO BE CASES WHERE THE SAME
20 INVESTIGATION SATISFIES ONE STANDARD, THE LOWER SPECIFIC AND
21 ARTICULABLE FACTS, AND DOES NOT SATISFY PROBABLE CAUSE,
22 REGARDLESS OF THE TYPE OF LOCATION INFORMATION THAT THE
23 GOVERNMENT SEEKS.

24 THE COURT: DO YOU HAVE A VIEW ON THAT?

25 MS. LEONIDA: YES, YOUR HONOR.

1 IF IT DOESN'T RISE TO THE LEVEL OF PROBABLE CAUSE, THE
2 GOVERNMENT SHOULDN'T BE ENTITLED TO IT.

3 I MEAN, I UNDERSTAND THAT THIS IS VALUABLE INFORMATION AND
4 THEY USE IT ALL THE TIME AND THEY ASK FOR IT TENS OF THOUSANDS
5 OF TIMES EVERY YEAR. BUT THAT DOESN'T CHANGE THE FOURTH
6 AMENDMENT ANALYSIS.

7 THE RILEY COURT HAD THE SAME ISSUE. THE GOVERNMENT IN
8 THAT CASE SAID, "THIS IS REALLY USEFUL AND IT'S VALUABLE AND
9 THERE'S SO MUCH INFORMATION AND IT REALLY HELPS US INVESTIGATE
10 CRIMES," AND THAT'S ALL TRUE, BUT THAT DOESN'T HAVE ANY BEARING
11 ON THE FOURTH AMENDMENT ANALYSIS.

12 HERE THIS IS INFORMATION THAT IS PROTECTED BY THE FOURTH
13 AMENDMENT.

14 AND IT'S NOT THAT ONEROUS TO GET A WARRANT. AS THE COURT
15 WAS JUST POINTING OUT, THIS INFORMATION EXISTS, IT'S IN THE
16 PAST, THERE'S NO URGENCY HERE, AND WARRANTS CAN BE ISSUED,
17 AGAIN, AS THE RILEY COURT NOTED, FAIRLY EASILY AND RAPIDLY.

18 THE COURT: DO YOU -- IS THERE A REASON -- ARE THERE
19 OTHER PHONE CARRIERS FOR WHICH YOU'RE AWARE OF WHAT THEIR
20 PRIVACY POLICY IS? IS THERE A REASON WHY YOU SELECTED
21 T-MOBILE, FOR EXAMPLE --

22 MR. SCHENK: DO YOU MEAN --

23 THE COURT: -- IN WHAT YOU PROVIDED?

24 MR. SCHENK: YOU MEAN WHEN THE GOVERNMENT PUT THAT IN
25 THE BRIEF?

1 THE COURT: YEAH.

2 MR. SCHENK: I KNOW THAT WE HAVE AVAILABLE TO US THE
3 PRIVACY POLICIES OF ALL OF THEM AND --

4 THE COURT: DO THEY ALL PROVIDE NOTICE OF CELL SITE
5 INFORMATION COLLECTION AND RETENTION, OR NOT?

6 MR. SCHENK: MY RECOLLECTION IS THAT IN ONE WAY OR
7 ANOTHER, THEY DO ALL INFORM THE INDIVIDUAL, THE CELL PHONE
8 USER, THAT THE INFORMATION USED IS USED FOR MANY PURPOSES,
9 INCLUDING LOCATION.

10 THE COURT: OKAY. BUT THEY'RE NOT ALL --

11 MR. SCHENK: BUT I'D WANT TO --

12 THE COURT: I'M SORRY. GO AHEAD.

13 MR. SCHENK: I'D WANT TO REREAD EACH OF THE OTHER
14 PRIVACY POLICIES BEFORE I FIRMLY COMMITTED TO THAT. THAT'S MY
15 RECOLLECTION OF THE POLICY.

16 THE COURT: BUT IT SEEMS THAT THE -- THERE'S
17 VAGUENESS AND SOME VARIANCE IN WHEN THAT INFORMATION IS
18 COLLECTED --

19 MR. SCHENK: YES.

20 THE COURT: -- IN TERMS OF THE DISCLOSURES FROM THE
21 CARRIERS.

22 MR. SCHENK: YOU MEAN VARIANCE AMONG CARRIERS AND
23 WHEN THEY COLLECT AND HOW FREQUENTLY THEY COLLECT INFORMATION?

24 THE COURT: OR WHAT THEY CHOOSE TO DISCLOSE IN THEIR
25 PRIVACY POLICY.

1 MR. SCHENK: THEY ALL --

2 THE COURT: ARE THEY JUST COLLECTING WHEN A TEXT DATA
3 OR CALL IS SENT OR RECEIVED? ARE THEY ALWAYS COLLECTING?
4 THERE'S A LOT OF VAGUENESS AND VARIANCES.

5 MR. SCHENK: RIGHT. THERE'S VARIETY AMONG THE
6 CARRIERS IN WHAT THEIR PRIVACY POLICY SAYS, AS WELL AS WHAT
7 THEY ACTUALLY COLLECT.

8 THE COURT: OTHER THAN -- I THINK IT WAS THE EFF
9 BRIEF WENT THROUGH DIFFERENT STATE LEGISLATION AND STATE
10 SUPREME COURT CASES REGARDING REQUIRING PROBABLE CAUSE IN A
11 SEARCH WARRANT.

12 DO YOU KNOW OF ANY OTHER STATES THAT HAVE PENDING
13 LEGISLATION OR ANY UPDATE? I MEAN, I THINK THEIR BRIEF WAS
14 FILED, LIKE, JUNE 15TH, SO IT'S NOT BEEN THAT MUCH TIME, BUT
15 IT'S BEEN A WEEK AND A HALF.

16 I DON'T KNOW IF YOU KNOW OF ANY OTHER UPDATES ON EITHER
17 CASES OR STATUTES.

18 MS. LEONIDA: NOT IN ADDITION TO WHAT IS IN THE EFF
19 BRIEF.

20 THE COURT: OKAY. SO EVERYONE AGREES THAT A USER
21 CANNOT -- LET ME ASK MR. SCHENK. WHAT ABOUT THE ARGUMENT THAT,
22 I THINK IT'S THE ACLU MAKES, THAT A USER CAN TURN LOCATION OFF,
23 BUT THE CARRIER IS STILL COLLECTING AND RETAINING THAT LOCATION
24 INFORMATION? DO YOU THINK THAT USER DOESN'T HAVE A REASONABLE
25 EXPECTATION OF PRIVACY AS TO THEIR LOCATION?

1 MR. SCHENK: I'M NOT --

2 THE COURT: THEY HAVE AFFIRMATIVELY TURNED THE
3 LOCATION OFF.

4 MR. SCHENK: I'M NOT FAMILIAR WITH THE PARTICULAR
5 TECHNOLOGY THAT THE ACLU OR EFF, WHICHEVER ONE IS MAKING THE
6 ARGUMENT, WHAT THEY'RE REFERRING TO THERE.

7 BUT THE INDIVIDUAL'S SPECIFIC EXPECTATION OF PRIVACY ISN'T
8 EITHER OF THE PORTIONS OF THE KATZ TEST THAT WOULD FIND WE NEED
9 A PROBABLE CAUSE STANDARD IN ORDER TO OBTAIN THIS INFORMATION.

10 THE IDEA THAT AN INDIVIDUAL MAKES AN AFFIRMATIVE ACT AT
11 ONE MOMENT IS ONLY SOMETHING THAT'S RELEVANT VIEWED COMPARED TO
12 WHAT PERIOD OF TIME THE GOVERNMENT WOULD BE ASKING FOR.

13 THE LOCATION, THE LOCATION DATA FOR A PERIOD OF DAYS OR
14 WEEKS OR MONTHS RELATIVE TO WHEN THAT ACT IS MADE, THAT DOESN'T
15 ADDRESS, THOUGH, THE OBJECTIVE STANDARD. SO EVEN THAT ACTION
16 DOESN'T CREATE A PROBABLE CAUSE STANDARD OR A REASONABLE
17 EXPECTATION OF PRIVACY UNDER KATZ.

18 THE COURT: WOULD YOU CONCEDE THAT THE COLLECTION BY
19 THE GOVERNMENT OF THE CELL SITE LOCATION INFORMATION, EVEN IF
20 IT'S HISTORICAL, IS MORE INVASIVE THAN GPS TRACKING?

21 MR. SCHENK: IS MORE INVASIVE?

22 THE COURT: UM-HUM.

23 MR. SCHENK: NO.

24 THE COURT: BECAUSE GPS IS TRACKING SOMEONE'S
25 MOVEMENT ON PUBLIC STREETS THAT IS VISIBLE TO ANYONE WHO'S

1 OUTSIDE.

2 MR. SCHENK: THE -- IN TERMS OF PRECISION, I DON'T
3 THINK THAT CELL SITE LOCATION INFORMATION IS AS PRECISE AS GPS.

4 IF THE COURT'S QUESTION IS A GPS TRACKER ATTACHED TO A CAR
5 VERSUS AN INDIVIDUAL CARRYING A PHONE --

6 THE COURT: ON THEIR BODY.

7 MR. SCHENK: -- WHICH ARE WE GOING TO GET MORE
8 INFORMATION FROM, WELL, YES, OF COURSE YOU'LL GET MORE
9 INFORMATION, MORE DATA POINTS, ON THE CELL PHONE.

10 THOUGH WHAT'S CURIOUS IS THE ARGUMENT THAT THE FEDERAL
11 PUBLIC DEFENDER AND THE ACLU MAKE IS ONE THEY WOULD NEVER
12 CONCEDE IN TRIAL, AND THAT IS THAT A PERSON IS HOLDING A PHONE.
13 RIGHT? THAT'S AN ARGUMENT THAT WHEN THIS INFORMATION IS
14 ACTUALLY ADMITTED IN TRIAL, THE GOVERNMENT HAS TO MAKE THE NEXT
15 STEP OF PROOF.

16 BUT IN THIS INSTANCE, WE'RE ALL PRESUMING THAT THAT
17 INFORMATION IS NOT JUST OF WHERE THE PHONE IS, BUT IS ACTUALLY,
18 YOU KNOW, A DIARY OF THE PERSON OVER A PERIOD OF DAYS.

19 BUT, YES, OF COURSE THE PERSON HAS THE PHONE MORE THAN
20 THEY HAVE THEIR CAR, MOST PEOPLE AT LEAST DO, SO IT GIVES YOU
21 MORE DATA.

22 THE COURT: IS THERE AN AGREEMENT ON HOW PRECISE THE
23 INFORMATION IS? YOU RAISE PRECISION, WHICH I DID WANT TO
24 FOLLOW UP WITH. I THINK THERE WAS -- OKAY. SO THIS IS -- THIS
25 IS WHAT THE ACLU SAYS, THAT WITH CELL SITE INFORMATION, YOU CAN

1 IDENTIFY INDIVIDUAL FLOORS AND ROOMS WITHIN BUILDINGS.

2 DO YOU AGREE WITH THAT?

3 MR. SCHENK: IT DEPENDS ON WHETHER SOMETHING CALLED A
4 FEMTOCELL IS BEING USED.

5 IN ALMOST NO INSTANCES CAN THE GOVERNMENT USE CELL SITE
6 LOCATION INFORMATION TO IDENTIFY THE PARTICULAR FLOOR IN A
7 PARTICULAR BUILDING THAT A PHONE WAS ON WHEN IT MADE A
8 PARTICULAR PHONE CALL.

9 THE EXCEPTION TO THAT, THOUGH, IS THIS TECHNOLOGY THAT I
10 JUST REFERRED TO.

11 THE COURT: OKAY. BUT YOU WOULD AGREE THAT CELL SITE
12 INFORMATION IS PRECISE ENOUGH TO TELL WHETHER SOMEONE IS IN THE
13 BUILDING, MAYBE NOT WHAT FLOOR OR WHAT ROOM, BUT THE FACT THAT
14 THEY'RE IN A BUILDING IS POSSIBLE?

15 MR. SCHENK: IT'S POSSIBLE. IT DEPENDS ON THE CITY
16 OR THE PARTICULAR TOWN OR LOCATION OF THE PHONE. IN RURAL
17 AREAS WHERE THERE ARE FEWER TOWERS, THERE'S LESS PRECISE
18 INFORMATION. IT'S ALL A FACTOR OF THE NUMBER OF TOWERS THAT
19 ARE IN AN AREA, THE NUMBER OF CARRIERS, THE NUMBER OF
20 OBSTRUCTIONS.

21 PHONES DON'T NECESSARILY USE THE CLOSEST TOWER TO THE
22 PHONE. THEY MOST OF THE TIME DO, BUT I BELIEVE IT'S LINE OF
23 SIGHT TECHNOLOGY.

24 SO THERE ARE ALL KINDS OF FACTORS IN PLAY IN DETERMINING
25 HOW PRECISE LOCATION INFORMATION CAN BE, AND IT CERTAINLY IS

1 NOT SAFE TO SAY IN EVERY INSTANCE THE GOVERNMENT CAN TELL THAT
2 A CELL PHONE WAS IN A PARTICULAR BUILDING. THAT'S NOT TRUE.

3 THE COURT: CAN YOU -- WHAT ARE MICROCELLS,
4 PICOCELLS, AND FEMTOCELLS?

5 MR. SCHENK: IT'S -- THE WAY I UNDERSTAND IT, IT'S
6 SOMETHING THAT REPLICATES A CELL TOWER. SO IF AN INDIVIDUAL
7 LIVES IN A RURAL AREA AND GETS BAD CELL PHONE RECEPTION --

8 THE COURT: WAIT, WHICH ONE? ALL OF THEM, OR --

9 MR. SCHENK: I THINK THAT THEY'RE WORDS FOR THE SAME
10 THING.

11 THE COURT: OKAY. GO AHEAD. SORRY.

12 MR. SCHENK: BUT THAT'S BEYOND THE TECHNOLOGICAL
13 UNDERSTANDING THAT I HAVE.

14 THE COURT: OKAY. GO AHEAD AND SAY, WHAT ARE
15 MICROCELLS, PICOCELLS, AND FEMTOCELLS?

16 MR. SCHENK: IF SOMEONE LIVES IN A RURAL AREA AND HAS
17 BAD CELL PHONE RECEPTION, ONE WAY THEY CAN IMPROVE THEIR CELL
18 PHONE RECEPTION IS TO HAVE A FEMTOCELL, AND THAT'S SOMETHING
19 THAT'S REGISTERED TO THEIR HOME ADDRESSES AND IT INCREASES --
20 THEIR PHONE THEN USES THAT CELL -- THAT DEVICE AS A CELL TOWER.
21 IT MIMICS OR IS A MINIATURE CELL TOWER.

22 SO INSTEAD OF USING THE CELL TOWER THAT MAY BE NINE MILES
23 FROM THEIR HOME AND IN A VALLEY, THEY THEN USE THAT TECHNOLOGY,
24 AND BECAUSE THEY'RE USING THIS INDIVIDUAL FEMTOCELL AND THOSE
25 FEMTOCELLS ARE OFTEN REGISTERED WITH THE CARRIER, THE

1 GOVERNMENT WOULD THEN KNOW THEY WERE -- THAT THAT CALL WAS
2 PINGING OFF OF THAT TOWER, AND IN THAT INSTANCE THE GOVERNMENT
3 COULD SAY THEY WERE ON A PARTICULAR PLOT OF LAND IN A HOME
4 BECAUSE THE CELL, THE FEMTOCELL WAS REGISTERED TO THE CARRIER.

5 THE COURT: AND YOU WOULD AGREE THAT OVER TIME, THE
6 PRECISION OF CELL SITE INFORMATION TO LOCATE AN INDIVIDUAL WITH
7 A DEVICE IS ONLY GOING TO GET MORE ACCURATE?

8 MR. SCHENK: I CAN SAY IT HAS GOTTEN MORE ACCURATE UP
9 UNTIL THIS POINT, YES.

10 THE COURT: UM-HUM.

11 DO YOU WANT TO COMMENT ANYTHING ABOUT PRECISION?

12 MS. LEONIDA: YES, YOUR HONOR.

13 THESE MICRO-, PICO-, AND FEMTOCELLS I THINK ARE DIFFERENT
14 TYPES OF CELL TOWERS THAT COVER SMALLER AND SMALLER AREAS. AND
15 THEY'RE NOT JUST LIMITED TO RURAL AREAS. THEY'RE USED BY
16 OFFICES WHO WANT TO HAVE BETTER RECEPTION FOR THE PEOPLE IN
17 THEIR WAITING ROOM. THEY'RE USED BY ALL KINDS OF PEOPLE, AND
18 THE CONGRESSIONAL TESTIMONY THAT WE'VE CITED, AS WELL AS THE
19 ACLU, MAKES THAT REALLY CLEAR. IT'S NOT LIMITED TO RURAL
20 AREAS.

21 BUT I THINK THE MORE SALIENT POINT IS THAT THE GOVERNMENT
22 HAS NO IDEA WHAT INFORMATION THEY'RE GOING TO GET WHEN THEY
23 MAKE THESE REQUESTS. THEY'RE NOT ASKING FOR CELL TOWERS THAT
24 ARE LIMITED TO A RANGE OF THREE MILES. THEY'RE ASKING FOR
25 EVERY SINGLE PIECE OF CELL TOWER LOCATION INFORMATION FOR A TWO

1 MONTH PERIOD.

2 AND SO IF THEY ARE FOLLOWING SOMEBODY WHO GOES FROM A
3 SERIES OF MICROCELLS TO PICOCELLS TO FEMTOCELLS AND THEY'RE
4 TRACKING THEM EVERY MINUTE OF EVERY DAY FROM ROOM TO ROOM IN A
5 BUILDING, I -- HERE THE GOVERNMENT IS SAYING THAT THAT'S RARE,
6 BUT THAT'S NOT THE QUESTION.

7 THE QUESTION IS, WHAT DO THEY NEED TO SHOW BEFORE THEY CAN
8 ACCESS THIS INFORMATION? AND THEY HAVE NO WAY OF KNOWING WHEN
9 THEY'RE ASKING FOR IT EXACTLY HOW PRECISE IT'S GOING TO BE, BUT
10 THEY'RE ACKNOWLEDGING HERE TODAY THAT NOT ONLY IT CAN BE THAT
11 PRECISE, BUT IT'S BECOMING MORE PRECISE.

12 AND GIVEN THE PROLIFERATION OF CELL PHONES, THERE'S NO
13 REASON TO THINK IT'S GOING TO STOP BECOMING MORE AND MORE
14 PRECISE AS TIME PASSES.

15 AGAIN, THE SUPREME COURT HAS MADE CLEAR SINCE 1983 THAT
16 THE RULES THAT A COURT ARTICULATES HAVE TO ACCOUNT FOR ADVANCES
17 IN TECHNOLOGY AND THIS IS EXACTLY THAT KIND OF ADVANCE.

18 THE COURT: DO YOU THINK THE BURDEN SHOULD BE HIGHER
19 FOR CELL SITE INFORMATION THAT TRIANGULATES AND GIVES A MORE
20 EXACT LOCATION OF WHERE A CELL USER IS OR NOT?

21 MR. SCHENK: NO.

22 THE COURT: UM-HUM.

23 MR. SCHENK: COUNSEL IS RIGHT. I DIDN'T MEAN TO SAY
24 THAT FEMTOCELLS WERE ONLY USED IN RURAL AREAS. I WAS GIVING
25 THE COURT AN EXAMPLE OF WHEN THEY WOULD BE USED.

1 BUT, NO, THE CASE LAW DOESN'T SAY THAT WHEN INFORMATION IS
2 TRANSFERRED TO A THIRD PARTY, THE GOVERNMENT CAN THEN GET IT
3 FOR SOMETHING LESS THAN PROBABLE CAUSE IF IT'S NOT PARTICULARLY
4 PRECISE.

5 PRECISION IS NOT THE FACT THAT CHANGES WHETHER PROBABLE
6 CAUSE FOR SPECIFIC AND ARTICULABLE FACTS IS THE STANDARD TO
7 OBTAIN THE INFORMATION. THE FACT IS THE CASE LAW SAYS THAT
8 THIS IS NOT CONTENT, THIS IS INFORMATION IN THE HANDS OF A
9 THIRD PARTY, AND COURTS HAVE NEVER GONE TO THE PLACE OF
10 REQUIRING THE GOVERNMENT TO OBTAIN SEARCH WARRANTS FOR THIS
11 TYPE OF INFORMATION, THESE RECORDS, IN THE HANDS OF A THIRD
12 PARTY. IT DOESN'T TURN ON PRECISION.

13 THE --

14 THE COURT: WELL, CAN'T PRECISION EVENTUALLY EVER
15 INFLUENCE REASONABLE EXPECTATION OF PRIVACY?

16 MR. SCHENK: CERTAINLY. JUSTICE ALITO, THOUGH, IN
17 JONES SAID THAT'S THE PLACE FOR THE LEGISLATURE TO ACT, THE
18 ADVANCES IN TECHNOLOGY, THOUGH I'D ARGUE THAT'S WHAT THEY WERE
19 THINKING ABOUT WHEN THEY RAISED THE STANDARD TO SPECIFIC AND
20 ARTICULABLE FACTS.

21 BUT THE FACT THAT GPS WAS, IS, AS WE DISCUSSED A MOMENT
22 AGO, SO PRECISE AND GPS WAS NOT FOUND TO BE A SEARCH BASED ON
23 REASONABLE EXPECTATION OF PRIVACY, BUT RATHER BASED ON
24 TRESPASS, PROVIDES SOME GUIDANCE TO THIS IDEA THAT IF WE HAVE A
25 SITUATION WHERE THE GOVERNMENT IS SEEKING CELL SITE LOCATION

1 INFORMATION AND IT'S GOING TO, LET'S SAY WE KNOW AHEAD OF TIME
2 IT'S GOING TO BE VERY PRECISE, THAT ISN'T AN INSTANCE WHERE WE
3 NEED TO THEN SEEK A WARRANT BECAUSE SOME CASE SAYS THAT
4 PRECISION IS WHAT TURNS REASONABLE EXPECTATIONS OF PRIVACY.
5 NO, THAT WASN'T FOUND IN JONES. IN JONES, IT WAS BASED ON
6 TRESPASS.

7 BUT, YES, IS THE COURT RIGHT THAT AT SOME POINT COULD OUR
8 IDEAS, OUR VIEWS EVOLVE? OF COURSE IT'S THEORETICALLY
9 POSSIBLE.

10 THIS ISN'T THE PROPER FORUM TO MAKE THOSE TYPES OF
11 DETERMINATIONS. AT THIS FORUM, WE LOOK AT WHAT THE CURRENT
12 CASE LAW IS AND WHAT THE STATUTE SAYS AND THE GOVERNMENT IS
13 ENTITLED TO OBTAIN THE INFORMATION THAT IT SEEKS UNDER THE
14 CURRENT STATUTE AND UNDER THE CURRENT CASE LAW.

15 THE COURT: AND YOUR ANSWER WOULD BE WE'RE SUPPOSED
16 TO ANTICIPATE CHANGES IN TECHNOLOGY?

17 MS. LEONIDA: YES.

18 BUT ALSO, I DON'T THINK WE HAVE TO ANTICIPATE CHANGES IN
19 TECHNOLOGY FOR THE FOURTH AMENDMENT TO ATTACH TO THIS
20 INFORMATION AS IT EXISTS TODAY. IN JONES, FIVE SUPREME COURT
21 JUSTICES FOUND THAT THE KATZ EXPECTATION OF PRIVACY WAS
22 VIOLATED BY LONG-TERM LOCATION MONITORING, IN THAT CASE 28
23 DAYS, MUCH SHORTER THAN THE 60 DAYS THAT THE GOVERNMENT IS
24 PROPOSING HERE, AND THAT'S -- YOU KNOW, THAT'S A DECISION THAT
25 CAME OUT JUST A COUPLE OF YEARS AGO.

1 I DON'T THINK THAT WE'RE -- I DON'T THINK WE HAVE TO
2 ANTICIPATE THAT EVERY ROOM HAS A PICOCELL BEFORE THE FOURTH
3 AMENDMENT APPLIES. THIS IS INFORMATION THAT THE GOVERNMENT IS
4 GATHERING NOW AND THAT PEOPLE HAVE AN EXPECTATION OF PRIVACY IN
5 RIGHT NOW. AND IT IS NOT -- THAT EXPECTATION IS NOT STRIPPED
6 BY THE FACT THAT A THIRD PARTY KEEPS THESE BUSINESS RECORDS.

7 IN A NUMBER OF CASES THAT WE'VE CITED, IN KATZ, IN JONES,
8 IN FERGUSON, IN FORRESTER OR WARSHAK, THE FACT THAT A THIRD
9 PARTY HAS ACCESS TO INFORMATION DOES NOT STRIP THAT INFORMATION
10 OF FOURTH AMENDMENT PROTECTIONS.

11 I THINK REFERRING TO IT AS A THIRD PARTY BUSINESS RECORD
12 BEGS THE QUESTION OF WHETHER THIS INFORMATION IS PROTECTED BY
13 THE FOURTH AMENDMENT, AND CELL SITE LOCATION INFORMATION
14 ABSOLUTELY HAS TO BE.

15 THE COURT: LET ME -- DOES IT MAKE A DIFFERENCE
16 WHETHER AN AFFIRMATIVE CALL OR TEXT OR DATA IS BEING SENT BY
17 THE DEVICE OWNER OR WHETHER SOMEONE IS SENDING A TEXT, PHONE
18 CALL, OR MESSAGE TO THAT DEVICE OWNER? DO YOU SEE WHAT I'M
19 SAYING? LIKE IS THERE LESS VOLUNTARY CONVEYANCE WHEN YOU DON'T
20 CONTROL WHAT'S BEING SENT TO YOU? YOU MAY NOT EVEN KNOW WHO'S
21 SENDING IT. YOU MAY NOT HAVE CONSENTED TO THAT PERSON
22 CONTACTING YOU.

23 DOES THAT -- IS THAT A DISTINCTION THAT SHOULD MATTER, OR
24 NOT? WOULD THAT JUST BE MORE CONFUSING?

25 MS. LEONIDA: I THINK CERTAINLY THAT IS LESS

1 VOLUNTARY. IF YOU DON'T KNOW WHO'S SENDING YOU A TEXT, YOU
2 DON'T EXPECT ONE OR DON'T WANT THE CALL THAT YOU'RE RECEIVING
3 OR IT GOES TO VOICEMAIL AND YOU DON'T EVEN KNOW THAT YOU'VE
4 RECEIVED A CALL, THAT'S CERTAINLY LESS VOLUNTARY.

5 BUT I DON'T THINK THAT THAT CAN BE SEPARATED FROM THE
6 VOLUNTARINESS ANALYSIS. IN OTHER WORDS, THAT IS PART OF WHAT
7 RENDERS HISTORICAL CELL SITE LOCATION INFORMATION NOT
8 VOLUNTARILY CONVEYED, BUT RATHER, AS FORRESTER CHARACTERIZED
9 E-MAIL TRANSMISSIONS, INFORMATION THAT IS PASSIVELY CONVEYED TO
10 A THIRD PARTY, BUT NOT TO ACHIEVE YOUR PURPOSE.

11 AGAIN, THE PERSON WHO CARRIES A CELL PHONE IS NOT
12 INTENDING FOR IT TO BE USED AS A TRACKING DEVICE. THEY'RE NOT
13 ASKING THE PHONE COMPANY TO MAINTAIN THESE RECORDS.

14 THE PURPOSE OF THE CELL PHONE IS TO MAKE THE CALL, AND THE
15 FACT THAT THE PHONE COMPANY MAINTAINS THESE RECORDS WHETHER OR
16 NOT THE USER WANTS THEM TO AND WHETHER OR NOT THE USER IS
17 ACTIVELY ENGAGED IN USING THE PHONE OR WANTS TO BE DOES GO TO
18 VOLUNTARINESS AND DISTINGUISHES THIS FROM CASES LIKE SMITH AND
19 LIKE MILLER.

20 THE COURT: DO YOU WANT TO RESPOND TO THAT, THAT IT'S
21 A LESS VOLUNTARY CONVEYANCE? IF YOU HAD NO KNOWLEDGE OF WHO IT
22 IS THAT'S SENDING YOU THAT TEXT OR THAT PHONE CALL, YOU NEVER
23 AUTHORIZED IT, YOU HAD NO KNOWLEDGE THAT YOU WERE GOING TO
24 RECEIVE IT, DOES THAT IN ANY WAY UNDERMINE THE VOLUNTARINESS OF
25 THE CONVEYANCE OF THE CELL SITE INFORMATION?

1 MR. SCHENK: VOLUNTARINESS AS A CONCEPT CAME IN IN
2 SMITH AND MILLER BECAUSE IT WAS INFORMATION THAT THE COMPANIES,
3 THE BANKS AND THE PHONE COMPANIES, WERE REQUIRED, COMPELLED TO
4 MAINTAIN AT THE GOVERNMENT'S REQUEST.

5 IN CASES WHERE THAT INFORMATION, LIKE THIS ONE, IS NOT
6 INFORMATION THAT THE PHONE COMPANIES ARE MAINTAINING AT THE
7 GOVERNMENT'S REQUEST, I DON'T THINK VOLUNTARINESS TURNS ON
8 WHETHER PROBABLE CAUSE APPLIES OR NOT.

9 THE COURT: WELL, SMITH WASN'T -- THE BANK -- IN
10 MILLER, THE BANK WAS KEEPING INFORMATION AS REQUIRED BY FEDERAL
11 LAW.

12 BUT THAT'S NOT THE CASE IN SMITH. IN SMITH, THE PHONE
13 RECORDS WERE BEING KEPT BY THE PHONE COMPANY JUST TO MAKE
14 MONEY, TO BILL THE USER. IT WAS NOT, YOU KNOW, UNDER
15 COMPULSION OF THE FEDERAL GOVERNMENT.

16 MR. SCHENK: I APOLOGIZE. MY RECOLLECTION WAS THAT
17 THE GOVERNMENT ASKED THE PHONE COMPANY TO MAINTAIN THOSE
18 RECORDS.

19 IN THE THIRD CIRCUIT'S DECISION ON THIS ISSUE --

20 THE COURT: YEAH.

21 MR. SCHENK: -- THEY FOUND THE INFORMATION, THE
22 TWO -- IT WAS A THREE-JUDGE OPINION, BUT TWO, ONE WAS TASHIMA,
23 CONCURRED, FOUND THAT THEY QUESTIONED WHETHER IT WAS
24 VOLUNTARILY CONVEYED, THAT THE PRIVACY POLICY IS VERY LONG AND
25 THEY DIDN'T KNOW WHETHER PEOPLE NECESSARILY READ THAT

1 INFORMATION, AND THEY STILL FOUND THAT PROBABLE CAUSE WASN'T
2 NECESSARY.

3 THE COURT: BUT ISN'T IT DIFFERENT TO SAY, "I WANT
4 BANKING SERVICES, HERE ARE MY RECORDS" TO THE BANK, "YOU'RE
5 FEDERALLY REQUIRED TO KEEP THESE RECORDS," OR "I WANT TO BE
6 ABLE TO MAKE PHONE CALLS FROM MY HOME LANDLINE, LET ME DIAL
7 THESE NUMBERS AND GO OUT."

8 THERE'S A LITTLE BIT OF A DIFFERENT AFFIRMATIVE ACT THAT'S
9 BEING DONE BY THE USER IN THOSE INSTANCES VERSUS I'M PASSIVELY
10 RECEIVING A CALL FROM A TELEMARKETER THAT I DON'T WANT TO
11 RECEIVE AND I NEVER AUTHORIZED THEM TO USE THIS NUMBER.

12 IS THERE A DIFFERENCE?

13 MR. SCHENK: YES. I UNDERSTAND THE POINT THE COURT
14 IS MAKING.

15 THE COURT: YEAH.

16 MR. SCHENK: IT CERTAINLY FEELS LIKE IT'S A DIFFERENT
17 AFFIRMATIVE ACT BY THE PERSON HOLDING THE PHONE IF THEY CAN BE
18 CALLED AND, AS A RESULT, ALL THIS DATA IS CREATED, AS OPPOSED
19 TO THEM MAKING THE AFFIRMATIVE ACT OF CALLING.

20 THE COURT: UM-HUM.

21 MR. SCHENK: I JUST DON'T SEE, THOUGH, THAT
22 DISTINCTION BEARING OUT IN THE CASE LAW THAT WOULD REQUIRE A
23 WARRANT TO OBTAIN THE PINGS ON IT, THE INFORMATION FOR PEOPLE
24 CALLING YOU, BUT SPECIFIC AND ARTICULABLE FACTS IS AN
25 ACCEPTABLE STANDARD FOR ALL OF THE INSTANCES WHEN LOCATION DATA

1 IS CREATED BASED UPON THE USER PRESSING A BUTTON ON THEIR
2 PHONE, MAKING SOME AFFIRMATIVE ACT.

3 THE STATUTE DOESN'T DRAW THAT LINE AND THE OTHER CIRCUITS
4 THAT HAVE DEALT WITH THE ISSUE HAVEN'T DRAWN THE LINE THERE.

5 BUT I SEE THE POINT YOUR HONOR IS MAKING. I JUST THINK AT
6 THIS POINT THOSE ARE ALL RECORDS THAT ARE MAINTAINED BY THE
7 PHONE COMPANY AND, AS A RESULT, ARE 2703(D) RECORDS THAT THE
8 GOVERNMENT CAN GET UNDER SPECIFIC AND ARTICULABLE FACTS.

9 THE COURT: BUT WOULD THAT BE A WORKABLE TEST FOR THE
10 GOVERNMENT TO SAY YOU CAN GET ALL -- I MEAN, I GUESS IT WOULD
11 BE A DIFFERENT SORT OF A PEN REGISTER VERSUS TRAP AND TRACE,
12 RIGHT? YOU CAN GET ALL AFFIRMATIVELY SENT INFORMATION BY THE
13 USER.

14 MR. SCHENK: THE COURT WOULD BE FINDING THE STORED
15 COMMUNICATIONS ACT, THIS PART OF IT, UNCONSTITUTIONAL IF IT
16 MADE THE GOVERNMENT DRAW THAT LINE BECAUSE THAT LINE IS NOT
17 INHERENT IN THE STATUTE.

18 THE STATUTE TALKS ABOUT OBTAINING RECORDS OF THE PHONE
19 COMPANY FROM A SPECIFIC AND ARTICULABLE FACTS STANDARD, AND TO
20 SHAVE THE STATUTE IN THAT WAY WOULD ESSENTIALLY BE SAYING
21 THINGS THAT THIS STATUTE ENTITLES YOU TO, YOU'RE ACTUALLY NOT
22 ENTITLED TO BECAUSE THERE ARE ADDITIONAL PRIVACY PROTECTIONS TO
23 A PORTION OF THOSE RECORDS.

24 THE COURT: OKAY. I'M GOING TO GIVE YOU THE LAST
25 WORD AND THEN -- I'M SORRY, I LOST TRACK OF THE TIME. I'LL

1 GIVE YOU THE LAST WORD AND THEN I'M GOING TO ASK YOU ACTUALLY
2 TO STEP OUTSIDE, AND ANYONE ELSE WHO IS NOT ENTITLED TO HAVE
3 SEALED INFORMATION TO PLEASE STEP OUTSIDE. I DON'T KNOW WHO
4 THAT IS IN HERE.

5 BUT GO AHEAD, PLEASE.

6 MS. LEONIDA: THANK YOU, YOUR HONOR.

7 JUST TO BACK UP TO AN ARGUMENT THE GOVERNMENT MADE ABOUT
8 THE IMPORTANCE OF THE RECORDS BEING MANDATED, NOT ONLY WERE THE
9 RECORDS IN SMITH NOT MANDATED BY THE GOVERNMENT, BUT MILLER AT
10 PAGE 443 EXPRESSLY SAYS THAT WHETHER THE GOVERNMENT MANDATES
11 THE BANK KEEPING THE RECORDS IS COMPLETELY IRRELEVANT AND THE
12 VOLUNTARINESS IS THE QUESTION, VOLUNTARINESS, AND THE
13 EXPECTATION OF PRIVACY.

14 AND IN THIS CASE -- BEFORE I GO THERE -- AND THE THIRD
15 CIRCUIT, I WANTED TO BE CLEAR, THE THIRD CIRCUIT NOT ONLY FOUND
16 THAT THE INFORMATION, CELL SITE INFORMATION WASN'T CONVEYED
17 VOLUNTARILY, BUT THAT DECISION PREDATED THE JONES DECISION, SO
18 I DON'T THINK THAT A READING OF THAT DECISION MAKES IT CLEAR
19 THAT IT MIGHT HAVE COME OUT DIFFERENTLY IF JONES HAD ALREADY
20 BEEN DECIDED. A LOT OF WHAT THEY SAY IS COMPLETELY
21 INCONSISTENT WITH THE JONES CONCURRENCES.

22 THE COURT: UM-HUM. I DIDN'T UNDERSTAND HOW THE
23 THIRD CIRCUIT ORDER WORKS. THE GOVERNMENT TRIES TO GET A PEN
24 REGISTER AND THEN IF IT'S DENIED, THEN THEY COME BACK WITH A
25 SEARCH WARRANT APPLICATION? I -- IT JUST SEEMS LIKE IT LEAVES

1 IT TO THE DISCRETION OF THE MAGISTRATE JUDGE TO DECIDE WHICH
2 PROCESS IS THE RIGHT ONE FOR THAT ONE PARTICULAR CASE.

3 HOW IS THAT SUPPOSED TO WORK? I WASN'T CLEAR.

4 MS. LEONIDA: I THINK THE THIRD CIRCUIT DID SAY THAT
5 UNDER THE STORED COMMUNICATIONS ACT, THE COURT HAS -- THE
6 MAGISTRATE HAS THE DISCRETION TO REQUIRE A WARRANT.

7 AND THAT BRINGS ME TO THE LAST ISSUE THAT I WANTED TO
8 ADDRESS IN RESPONSE TO THE COURT'S CONCERN.

9 THE COURT: CAN I ASK YOU A QUESTION AND THEN I'LL
10 LET YOU DO THAT? IS THE GOVERNMENT THEN SUPPOSED TO CONTACT
11 THE MAGISTRATE JUDGE AND SAY, "HERE IS OUR SITUATION, WHICH ONE
12 ARE YOU GOING TO REQUIRE?" OR THEY HAVE TO GO IN WITH THE PEN
13 REGISTER FIRST AND THEN COME BACK WITH THE SEARCH WARRANT
14 APPLICATION IF IT GETS DENIED? I'M JUST NOT CLEAR HOW THAT'S
15 GOING TO WORK.

16 MAYBE YOU MIGHT KNOW THAT, TOO. IS THERE SUPPOSED TO BE
17 AN INITIAL CONSULTATION TO UNDERSTAND WHICH ROUTE TO PURSUE UP
18 FRONT?

19 MS. LEONIDA: THE THIRD CIRCUIT OPINION WASN'T CLEAR
20 ABOUT, GOING FORWARD, WHAT THE STANDARD IS.

21 THE COURT: OKAY.

22 MS. LEONIDA: BUT IF -- I IMAGINE EITHER OF THOSE
23 THINGS COULD HAPPEN. THE GOVERNMENT COULD GET -- APPLY FOR A
24 SEARCH WARRANT BASED ON PROBABLE CAUSE OR THEY COULD TRY TO GET
25 A 2703(D) ORDER, FAIL, AND THEN TRY TO ACQUIRE ENOUGH

1 INFORMATION TO APPLY AGAIN UNDER THE PROBABLE CAUSE STANDARD.

2 THE COURT: OKAY. DO YOU HAVE A VIEW ON THAT, HOW
3 THAT'S SUPPOSED TO WORK?

4 MR. SCHENK: JUDGE TASHIMA WROTE THAT THAT'S
5 UNWORKABLE, THAT THE IDEA THAT A MAGISTRATE JUDGE WOULD
6 HAPHAZARDLY SAY, "IN SOME INSTANCES I WANT PROBABLE CAUSE AND
7 IN OTHERS I WANT SPECIFIC AND ARTICULABLE FACTS" IS AGAINST THE
8 SPIRIT OF THE STATUTE AND, IN FACT, THE SOLUTION SUGGESTED WAS
9 THE GOVERNMENT COULD PRESENT SPECIFIC AND ARTICULABLE FACTS AND
10 IF THERE WAS SOME SPECIFIC REASON WHY THE GOVERNMENT HAD NOT
11 MET THAT STANDARD, THEN THE MAGISTRATE, IN JUDGE TASHIMA'S
12 VIEW, COULD ASK THE GOVERNMENT FOR MORE FACTS, FOR MORE
13 INFORMATION.

14 BUT TO ANSWER THE COURT'S DIRECT QUESTION, I DON'T KNOW
15 HOW THAT'S SUPPOSED TO WORK.

16 THAT ISN'T WHAT THE STATUTE SAYS. THAT IS, THAT THERE'S
17 NO SCHEME SET UP WHERE THERE IS AN INITIAL CONSULTATION AND THE
18 MAGISTRATE TELLS THE GOVERNMENT, "THIS SOUNDS LIKE A PROBABLE
19 CAUSE CASE TO ME" OR "THIS SOUNDS LIKE A SPECIFIC AND
20 ARTICULABLE FACTS CASE."

21 THE STATUTE LEAVES IT UP TO THE DISCRETION OF THE
22 GOVERNMENT TO SEEK IT UNDER ONE OF THOSE TWO, AND IT -- WHAT
23 JUDGE LLOYD DID IN THIS CASE WAS NOT SAY, "I THINK THAT THIS IS
24 A CASE THAT REQUIRES PROBABLE CAUSE." JUDGE LLOYD SAID, "I
25 DON'T THINK YOU CAN GET THIS TYPE OF INFORMATION WITHOUT

1 PROVIDING PROBABLE CAUSE INFORMATION." HE THOUGHT THAT THIS
2 INFORMATION WAS UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT
3 AND, THEREFORE, REQUIRED A PROBABLE CAUSE SEARCH WARRANT.

4 SO OF THE -- THE QUESTION BEFORE THE COURT I DON'T THINK
5 SHOULD BE HOW TO WORK THE TWO STANDARDS IN 2703(D). I THINK
6 THAT THAT'S SOMETHING THAT THE GOVERNMENT IS ABLE TO SUBMIT
7 UNDER SPECIFIC AND ARTICULABLE FACTS AND HAVE MAGISTRATES SIGN.

8 THE COURT: OKAY. I'M GOING TO LET YOU HAVE THE LAST
9 WORD AND THEN I'M GOING TO ASK YOU TO STEP OUTSIDE. I HAVE
10 JUST A COUPLE OF QUICK QUESTIONS FOR THE GOVERNMENT.

11 MS. LEONIDA: THANK YOU, YOUR HONOR.

12 I DID WANT TO TURN TO THE STORED COMMUNICATIONS ACT.

13 THE COURT: OKAY. GO AHEAD.

14 MS. LEONIDA: OBVIOUSLY THE STORED COMMUNICATIONS ACT
15 CANNOT STRIP INFORMATION OF FOURTH AMENDMENT PROTECTION WHERE
16 IT EXISTS, AS WE CONTEND IT DOES HERE.

17 BUT I ALSO DON'T THINK THAT THE STORED COMMUNICATIONS ACT
18 IS TRYING TO DO THAT. THIS IS NOT A FACIAL CHALLENGE TO THE
19 STORED COMMUNICATIONS ACT.

20 ON MONDAY THE SUPREME COURT DECIDED CITY OF LOS ANGELES
21 VERSUS PATEL, AND AT PAGE 5 WROTE THAT A FACIAL CHALLENGE IS AN
22 ATTACK ON A STATUTE ITSELF, AS OPPOSED TO A PARTICULAR
23 APPLICATION.

24 AND WHAT WE'RE ATTACKING HERE IS THE APPLICATION OF THE
25 STORED COMMUNICATION ACT TO GET CELL SITE LOCATION INFORMATION,

1 WHICH WAS NOT CONTEMPLATED BY THE ACT AS JUDGE ILLSTON FOUND.

2 IF THE COURT LOOKS AT THE LEGISLATIVE HISTORY, THERE IS
3 NOTHING IN THERE THAT WOULD SUGGEST THAT THE STORED
4 COMMUNICATIONS ACT INTENDED TO COVER HISTORICAL CELL SITE
5 LOCATION INFORMATION, PARTICULARLY THE 2010 HEARING TESTIMONY
6 MAKES IT CLEAR THAT THAT WAS NOT THE POINT OF THE STORED
7 COMMUNICATIONS ACT, ESPECIALLY NOT WHEN IT WAS PASSED IN 1986.

8 BECAUSE HISTORICAL CELL SITE LOCATION INFORMATION IS
9 PROTECTED BY THE FOURTH AMENDMENT AND NOT COVERED BY THE ACT,
10 THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE MAKES IT CLEAR THAT
11 THE COURT CAN REQUIRE A WARRANT WITHOUT HAVING TO SAY THAT THE
12 STORED COMMUNICATIONS ACT IS UNCONSTITUTIONAL, AND THAT'S WHAT
13 WE BELIEVE THE COURT SHOULD DO.

14 THE COURT: DO YOU WANT TO RESPOND? I MEAN, THE
15 STORED COMMUNICATIONS ACT DOES SAY THAT THAT INFORMATION CAN BE
16 SOUGHT BY A WARRANT, SO, I MEAN, THAT'S IN THE STATUTE.

17 BUT WHAT ABOUT THE SECTION THAT JUST REQUIRES SPECIFIC AND
18 ARTICULABLE FACTS?

19 MS. LEONIDA: THAT SECTION -- THAT SECTION DOESN'T --

20 THE COURT: IS THAT SUPERFLUOUS, OR --

21 MS. LEONIDA: NOT SUPERFLUOUS, BUT IT'S --

22 THE COURT: OKAY.

23 MS. LEONIDA: I BELIEVE THAT A READING OF THE
24 LEGISLATIVE HISTORY SHOWS THAT THAT SECTION WAS NOT INTENDED TO
25 APPLY TO HISTORICAL CELL SITE LOCATION INFORMATION.

1 AND I THINK ALSO LOOKING AT THE MAY/SHALL/ONLY IF LANGUAGE
2 OF THAT SECTION ALSO ALLOWS THE COURT TO REQUIRE A WARRANT FOR
3 THAT KIND OF INFORMATION.

4 THE COURT: UM-HUM.

5 MS. LEONIDA: HISTORICAL CELL SITE LOCATION
6 INFORMATION IS NOT THE SAME AS SUBSCRIBER INFORMATION. IT'S
7 NOT WHOSE PHONE IT IS AND WHAT ADDRESS THE BILLS GO TO.

8 IT IS -- AS WE'VE ALL BEEN TALKING ABOUT, IT'S A
9 COMPREHENSIVE, DETAILED PICTURE OF WHERE PEOPLE GO EVERY DAY
10 AND EVERY NIGHT FOR, IN THIS CASE, A TWO MONTH PERIOD.

11 AND I DON'T THINK THAT 2703(D), BY ANY READING, WAS
12 INTENDED TO ABROGATE THE FOURTH AMENDMENT TO SAY THAT YOU CAN
13 GET THAT INFORMATION ON LESS THAN A SHOWING OF PROBABLE CAUSE.

14 THE COURT: UM-HUM. WELL, THEN, LET ME ASK
15 MR. SCHENK, WHY WOULD I HAVE TO DECLARE THE STORED
16 COMMUNICATIONS ACT UNCONSTITUTIONAL IF THERE IS A PROVISION
17 THAT SAYS YOU CAN GET THIS INFORMATION THROUGH A WARRANT?

18 MR. SCHENK: BECAUSE THERE'S A PROVISION THAT SAYS
19 YOU CAN GET IT THROUGH SPECIFIC AND ARTICULABLE FACTS. THE
20 LEGISLATIVE HISTORY OF CALEA INCLUDED DISCUSSIONS OF LOCATION
21 INFORMATION.

22 FBI DIRECTOR LOUIS FREEH, THOMAS WHEELER, WHO WAS WITH A
23 TRADE GROUP, I THINK THE GROUP WAS CALLED THE CELLULAR
24 INDUSTRY -- I'M SORRY -- CELLULAR TELECOMMUNICATIONS INDUSTRY
25 ASSOCIATION, ALSO TALKED ABOUT THAT TYPE OF LOCATION

1 INFORMATION.

2 SO TO SAY THAT SPECIFIC AND ARTICULABLE FACTS IS ACTUALLY
3 NOT THE RIGHT STANDARD TO OBTAIN LOCATION INFORMATION BECAUSE,
4 AS COUNSEL IS ARGUING, LOCATION INFORMATION IS CONTENT OR
5 QUASI-CONTENT GOES SOMEWHERE THAT NO COURT HAS GONE AND FINDS
6 THAT THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT GIVES THE
7 GOVERNMENT THE AUTHORITY TO OBTAIN RECORDS, INCLUDING LOCATION
8 INFORMATION, UNDER A SHOWING OF SPECIFIC AND ARTICULABLE FACTS,
9 AND IF THAT ISN'T TRUE, THE REASON IT ISN'T TRUE IS BECAUSE
10 THAT VIOLATES THE FOURTH AMENDMENT AND, THEREFORE, THE COURT
11 WOULD BE DECLARING THIS ACT UNCONSTITUTIONAL.

12 THE COURT: ALL RIGHT. I SAID I'D GIVE YOU THE LAST
13 WORD. I'M GOING TO GIVE YOU THE LAST WORD AND THEN I'M GOING
14 TO ASK YOU TO STEP OUTSIDE, PLEASE.

15 MS. LEONIDA: I'LL TRY TO MAKE MY LAST WORD SHORT.

16 THE COURT: OKAY.

17 MS. LEONIDA: JUST TWO THINGS.

18 THE COURT: YES.

19 MS. LEONIDA: FIRST, I MAINTAIN, AND I'M SURE THE
20 COURT HAS READ THE LEGISLATIVE HISTORY, THE STORED
21 COMMUNICATIONS ACT, 2703(D), IS NOT INTENDED TO COVER
22 HISTORICAL CELL SITE LOCATION INFORMATION.

23 BUT EVEN IF IT WERE, THAT SECTION, BY ITS TERMS, SAYS THAT
24 A WARRANT MAY BE ISSUED, NOT SHALL BE ISSUED, AND THAT IT SHALL
25 BE ISSUED ONLY IF THE GOVERNMENT ENTITY OFFERS SPECIFIC AND

1 ARTICULABLE FACTS.

2 SO I THINK THE COMBINATION OF THE LANGUAGE OF "MAY BE" AND
3 "SHALL BE ISSUED ONLY IF" CLEARLY GIVES THE COURT DISCRETION TO
4 REQUIRE A WARRANT FOR THIS INFORMATION.

5 THE COURT: OKAY. THANK YOU. THANK YOU VERY MUCH.

6 I'M GOING TO ASK ANYONE WHO IS NOT ENTITLED TO SEE THE
7 SEALED APPLICATION TO PLEASE STEP OUTSIDE. THANK YOU.

8 (PAUSE IN PROCEEDINGS.)

9 (PAGES 49-56 UNDER SEAL.)

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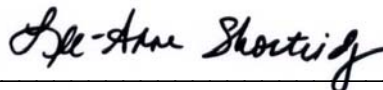
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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: JULY 24, 2015